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In the Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
PETITIONERS

v.

KFC WESTERN, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972(a)(1)(B), authorizes a private landowner to sue prior owners in federal court to recover its past cost of removing hazardous wastes that they had left at the site, but that no longer pose any danger to health or the environment.

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INTEREST OF THE UNITED STATES

Congress has vested federal and state authorities with primary responsibility for enforcing environmental statutes, but it has supplemented the government's enforcement powers with "citizen suit" remedies, which authorize private citizens to bring civil actions in certain circumstances. The United States has a strong interest in ensuring that a meaningful, yet appropriate, citizen suit remedy is available to private litigants.

The United States has a particular interest in the interpretation of Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), which, un-

like the citizen suit provisions contained in other federal environmental statutes, authorizes a private party to bring a civil action in response to an "imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). Section 7002(a)(1)(B) grants citizens authority that is similar, but not identical, to the authority that Section 7003 grants to the federal government to respond to an "imminent and substantial endangerment" resulting from the handling, storage, treatment, transportation, or disposal of solid or hazardous waste. See 42 U.S.C. 6973. The United States has a strong interest in ensuring that the Court is aware of the relationship between the relevant statutory provisions.

The United States also has an interest in Section 7002(a)(1)(B) as a potential defendant in a citizen suit. Section 7002(a)(1)(B) expressly provides that "the United States and any other governmental instrumentality or agency" may be named as a defendant in a citizen action. 42 U.S.C. 6972(a)(1)(B). Citizens accordingly have a right to seek judicial relief against the federal government if its waste management activities pose an "imminent and substantial endangerment" within the meaning of RCRA.

STATEMENT

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, empowers the federal government to regulate activities respecting solid and hazardous wastes. RCRA contains a citizen suit provision that authorizes private parties to commence a civil action in response to waste activities that present an "imminent and substantial endangerment." See RCRA § 7002, 42 U.S.C. 6972. Respondent KFC Western, Inc., brought a RCRA citizen suit

against petitioners Alan and Margaret Meghrig to recover its expenses in removing hazardous waste contamination from property that it had purchased from them. The district court dismissed the suit on the ground that there was no "imminent and substantial endangerment" at the time of suit. See Pet. App. A21-A23. The court of appeals reversed, holding that a citizen may bring suit under Section 7002(a)(1)(B) in response to past endangerment and that a court may provide the citizen with a restitutionary remedy. *Id.* at A1-A20.

A. The Resource Conservation and Recovery Act

RCRA, which is also known as the Solid Waste Disposal Act, is a comprehensive environmental statute that empowers the Environmental Protection Agency (EPA) to regulate the treatment, storage, and disposal of solid and hazardous wastes "from cradle to grave." *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1590 (1994); *Environmental Defense Fund* v. *EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011 (1989).

Subtitle C of RCRA, which includes Sections 3001 to 3013, authorizes the EPA to identify and list hazardous wastes and to promulgate standards governing generators and transporters of hazardous wastes and owners and operators of hazardous waste facilities. See 42 U.S.C. 6921-6934 (1988 & Supp. V 1993). Subtitle D, which includes Sections 4001 to 4009, authorizes standards for the regulation of nonhazardous solid wastes. See 42 U.S.C. 6941-6949. See generally *City of Chicago*, 114 S. Ct. at 1590.[1]

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[1] Section 1004(27) of RCRA defines the term "solid waste" to include a broad range of solid, liquid, and contained gaseous materials. 42 U.S.C. 6903(27). Section 1004(5) defines the term "hazardous waste" as a subset of "solid waste" that meets certain additional criteria. 42 U.S.C. 6903(5).

Section 3008 of RCRA grants the EPA authority to enforce federal hazardous waste regulations through compliance orders, criminal penalties, and civil penalties. See 42 U.S.C. 6928. In addition, Section 7003(a) authorizes the EPA to take action with respect to imminent hazards. 42 U.S.C. 6973(a). Section 7003(a) states that

> upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment,

the EPA may bring suit against any person who has contributed to that endangerment

> to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

Ibid. Section 7003(a) also provides the EPA with the additional authority, which is not available to other plaintiffs, to "take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment." *Ibid.*[2]

Like other federal environmental statutes, RCRA includes citizen suit provisions. Section 7002 allows private citizens and other "persons" to bring a civil

[2] The government's enforcement powers under RCRA are similar to those contained in the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, which also grant power to enforce statutory and regulatory requirements and to respond to imminent hazards. See CWA §§ 309 and 504, 33 U.S.C. 1319 (1988 & Supp. V 1993) and 1364; CAA §§ 113 and 303, 42 U.S.C. 7413 and 7603 (Supp. V 1993).

suit against any person alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order under the Act. See RCRA § 7002(a)(1)(A), 42 U.S.C. 6972(a)(1)(A); see also RCRA § 1004(15), 42 U.S.C. 6903(15) (defining "person").[3] But unlike other environmental statutes, RCRA also authorizes citizen actions to address imminent hazards. See RCRA § 7002(a)(1)(B), 42 U.S.C. 6972(a)(1)(B).

Section 7002(a)(1)(B) states in relevant part that "any person may commence a civil action on his own behalf" against any other person, "including the United States and any other government instrumentality or agency" who

> has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. 6972(a)(1)(B). Section 7002 also sets out the remedies that are available with respect to such

[3] The CWA and the CAA contain a nearly identical authorization. See CWA § 505(a)(1), 33 U.S.C. 1365(a)(1); CAA § 304(a)(1), 42 U.S.C. 7604(a)(1) (Supp. V 1993). Many other environmental statutes contain a similar authorization. See Toxic Substances Control Act, 15 U.S.C. 2619(a)(1); Endangered Species Act of 1973, 16 U.S.C. 1540(g)(1); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(a)(1); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(1); Safe Drinking Water Act, 42 U.S.C. 300j-8(a)(1); Noise Control Act of 1972, 42 U.S.C. 4911(a)(1); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9659(a)(1); Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(1); Deepwater Port Act of 1974, 33 U.S.C. 1515(a)(1).

a suit. Section 7002(a) grants a district judge jurisdiction

> to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both.

42 U.S.C. 6972(a).

Section 7002(a) expressly states that a citizen action under Section 7002(a)(1)(B) is subject to the notice requirements and other limitations contained in Section 7002(b)(2). See RCRA § 7002(a), 42 U.S.C. 6972(a).[4] Section 7002(a)(1)(B) does not contain any analog to the EPA's power under Section 7003 to "take other action," such as issuing administrative orders, in response to the imminent hazard. See RCRA § 7003(a), 42 U.S.C. 6973(a). But in other respects, Section 7002(a)(1)(B) grants the private citizen a remedy that is similar to the EPA's remedy under Section 7003.

B. The Proceedings Below

This RCRA citizen action arises from the cleanup of contaminated property in Los Angeles, California, that is currently owned by respondent and used for the operation of a "Kentucky Fried Chicken" restaurant. Pet. App. A2. Respondent purchased the property from petitioners in September 1975. In October 1988, respondent took steps to construct the restaurant and discovered that the underground soil was contaminated with refined petroleum products, allegedly caused by past operation of a gasoline station at the site. *Ibid.* The Ctiy of Los Angeles Department of Building and Safety thereafter ordered respondent to clean up the property. Respondent completed cleanup in 1989, at a cost of $211,000. Respondent requested petitioners to reimburse those costs, but petitioners refused. *Ibid.*

On May 29, 1992, respondent brought this citizen action in federal district court to recover its cleanup costs, pursuant to RCRA Section 7002(a)(1)(B). Petitioners moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting that: (1) because respondent had completed the cleanup three years earlier, there was no "imminent and substantial endangerment"; and (2) Section 7002(a)(1)(B) provides no jurisdiction for a suit to recover private cleanup costs. Pet. App. A2-A3. On September 21, 1992, the district court granted the motion to dismiss without prejudice, holding that Section 7002(a)(1)(B) "does not provide for a private damage suit" and that "there is no 'imminent' danger, a prerequisite of a private suit," because "the clean-up is done." *Id.* at A24-A25.

Respondent amended its complaint to assert that there was an "imminent and substantial endangerment" at the time of cleanup and that Section 7002(a)(1)(B) allowed a monetary recovery as a form of "equitable restitution." See Pet. App. A3. The district court dismissed the amended complaint with prejudice, ruling that Section 7002(a)(1)(B)

[4] Section 7002(b(2) basically provides (among other things) that a citizen may not commence an action: (1) prior to 90 days after the plaintiff has given notice of the endangerment to the EPA, the relevant State, and any alleged contributor; or (2) if the EPA or a State has taken specified actions to address the endangerment under RCRA or CERCLA. See 42 U.S.C. 6972(b)(2)(A), (B) and (C).

"is limited * * * to injunctive relief" and that "there is no provision for suits for damage[s] after the cleanup is done and the danger is gone." *Id.* at A21-A23.

A divided court of appeals reversed and remanded. Pet. App. A1-A20. The court ruled that Section 7002 authorizes a citizen suit if an endangerment existed as of the cleanup, even if it had been abated at the time of filing the complaint. *Id.* at A5. The court found support for its holding in an Eighth Circuit decision, *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (1989), which addressed the government's powers under Section 7003 of RCRA. The court specifically relied on the Eighth Circuit's statement in *Aceto* that Section 7003(a) "does not require the EPA to file and prosecute its RCRA action *while* the endangerment exists." Pet. App. A6, quoting 872 F.2d at 1383 (emphasis in original).

The court of appeals also ruled that Section 7002(a)'s grant of jurisdiction to the district courts to order "such other action as may be necessary" provides citizens with a right to recover their cleanup costs. Pet. App. A6. The court reasoned from the Eighth Circuit's decisions in *Aceto* and *United States* v. *Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 810 F.2d 726 (1986), cert. denied, 484 U.S. 848 (1987), that the EPA is entitled to sue for restitution. It concluded that there is "no principled reason to distinguish between the relief available to the [EPA] and that available to private plaintiffs under the virtually identical statutory provisions." Pet. App. A7-A9.[5]

[5] The court stated that it would be "unfair and poor public policy" to bar private restitution actions, leaving innocent parties to pay for cleanup. Pet. App. A10. The court acknowledged that state law may provide remedies, but it suggested that those remedies are "generally inadequate because of the difficulties of proof and attendant court delays." *Id.* at A11 n.6. The court also recognized that Section 107(a)(4)(B) of CERCLA authorizes private parties to recover cleanup costs associated with the release of a "hazardous substance." See 42 U.S.C. 9607(a)(4)(B). The court observed, however, that CERCLA's exclusion of petroleum from the definition of "hazardous substance" would preclude a CERCLA cost recovery action where, as here, the cleanup involves only refined petroleum products. Pet. App. A11 n.6; see 42 U.S.C. 9601(14).

Judge Brunetti dissented. Pet. App. A12-A20. He concluded that the "unambiguous" language of Section 7002(a) "requires that the endangerment must be occurring at the time of filing suit." *Id.* at A14. He also concluded that Section 7002(a) does not authorize private cost reimbursement actions, concluding that the Eighth Circuit decisions had assumed the availability of a reimbursement remedy, without actually deciding the issue. *Id.* at A12, A13.[6]

SUMMARY OF ARGUMENT

Section 7002(a)(1)(B) of RCRA confers on private plaintiffs an important, but limited, right to obtain relief from a federal district court. It au-

[6] After the court of appeals decided this case, a divided Eighth Circuit panel ruled that Section 7002(a)(1)(B) does not authorize a private action for past cleanup costs. *Furrer* v. *Brown*, 62 F.3d 1092, 1100 (1995). The panel concluded that the court of appeals in this case had "misconstrue[d]" *Aceto* and *NEPACCO*. *Id.* at 1101. It stated that in both cases, "because the defendants did not raise the issue of subject matter jurisdiction and neither the district courts nor this Court addressed it *sua sponte*, the decisions reflect no consideration of the jurisdictional issue." *Ibid.* The panel did not address whether Section 7002(a)(1)(B) requires a present endangerment. See *id.* at 1095 n.6. The plaintiffs in *Furrer* filed a petition for rehearing and suggestion for rehearing en banc, which were denied.

thorizes a citizen to bring a private action in response to a situation that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). The court of appeals erred in concluding that the citizen may bring an action based on solely past endangerment. The plain language of Section 7002(a)(1)(B) requires the current existence of a potentially "imminent" danger; it does not allow a private party to bring suit in response to a situation that no longer poses any substantial threat to health or the environment. Accordingly, respondent cannot bring suit under Section 7002(a)(1)(B) to recover its past cleanup expenditures and must instead pursue the remedies that are available to property owners under state law.

In the course of reaching its decision, the court of appeals stated that Section 7002(a)(1)(B) provides a citizen plaintiff with a "restitutionary remedy." Pet. App. A6. A citizen plaintiff that has alleged a current threat of substantial endangerment, has satisfied Section 7002's other conditions for bringing a citizen suit, and has spent sums to abate a current endangerment, may be entitled to receive recompense in the action under the equitable doctrine of restitution. The Court, however, is under no obligation to resolve that issue in this case, because, as we have explained, respondent has failed to satisfy the statutory conditions for bringing a citizen suit.

ARGUMENT

SECTION 7002(a)(1)(B) OF RCRA DOES NOT PROVIDE A MECHANISM FOR A PRIVATE LANDOWNER TO SUE PRIOR OWNERS IN FEDERAL COURT TO RECOVER PAST COSTS OF REMOVING HAZARDOUS WASTES THAT NO LONGER POSE ANY DANGER AT THE SITE

A. Section 7002(a)(1)(B) Authorizes A Person To Commence A Civil Action In Response To A Current Threat Of Substantial Danger To Health Or The Environment

1. As this Court has observed in prior cases involving citizen suit provisions, "the starting point for interpreting a statute is the language of the statute itself." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 25 (1989); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987). Section 7002(a)(1)(B) authorizes a private party to commence a civil action in federal court in response to specified activities that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). That statutory language unambiguously indicates that the suit may go forward only if it alleges a current threat of substantial danger.

Section 7002(a)(1)(B)'s carefully drawn language indicates that Congress recognized a distinction between a situation that "may present" an imminent hazard and one that posed a threat to health or the environment only in the past. Congress granted citizens a right to seek relief in federal courts to address current situations, which by their nature present the most pressing need for a judicial remedy. It did not grant citizens a right under Section 7002(a)(1)(B) to commence an action in fed-

eral court to recover the past costs of cleaning up a site that no longer presents any danger.[7]

The distinction between a past and present hazard is manifested throughout the relevant provisions of Section 7002. Section 7002(a) states that a Section 7002(a)(1)(B) action may be brought in the district in which "the alleged endangerment may occur." 42 U.S.C. 6972(a). Section 7002(b)(2)(A)(ii) provides that no action may be commenced prior to 90 days after notice to "the State in which the alleged endangerment may occur." 42 U.S.C. 6972(b)(2)(A)(ii). And Section 7002(b)(2)(B) states that no such action may be commenced if the EPA has taken specified abatement actions in response to the activities "which may present the alleged endangerment." 42 U.S.C. 6972(b)(2)(B).

If Congress had wished to authorize private citizen suits in cases involving past endangerment, it could easily have indicated that intent by extending Section 7002(a)(1)(B) to activities "which have presented or may present" an endangerment. Congress did not do so, and that omission does not appear inadvertent. Congress understood the significance of temporal distinctions. For example, it included among

[7] Congress has addressed certain aspects of cost recovery in other legislation, including CERCLA. See CERCLA § 107(a), 42 U.S.C. 9607(a) (allowing the government and private parties to recover the costs of responding to releases and threatened releases of "hazardous substances"). See also CWA § 311(f), 33 U.S.C. 1321(f) (allowing the government to recover costs of responding to discharges of oil or hazardous substances into navigable waters); RCRA § 9003(h)(6), 42 U.S.C. 6991b(h)(6) (allowing the government to recover costs of responding to petroleum leaks from underground storage tanks). Other aspects of cost recovery remain primarily the province of state law. See nn. 19-20, *infra*.

the potentially liable defendants "any *past or present* generator, *past or present* transporter, or *past or present* owner or operator * * * who *has contributed or who is contributing* to the *past or present* handling, storage, treatment, transportation, or disposal." 42 U.S.C. 6972(a) (emphasis added). Congress nevertheless provided that those defendants would be subject to a citizen suit under Section 7002(a)(1)(B) only in situations that "may present" an imminent hazard. 42 U.S.C. 6972(a)(1)(B).[8]

2. This Court's decision in *Gwaltney* provides additional support for the conclusion that Section 7002(a)(1)(B) allows a citizen suit in response to only a current threat of endangerment. *Gwaltney* involved a dispute over whether Section 505(a)(1) of the Clean Water Act, 33 U.S.C. 1365(a)(1), which authorizes citizen suits against persons "alleged to be in violation of" permit conditions, confers jurisdiction over suits for wholly past violations. The Court held that the "most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past

[8] The legislative history supports the natural reading of the text. Congress broadened the scope of Section 7002(a)(1)(B) through the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401(a)-(b), 98 Stat. 3268-3269. The House committee report explaining those amendments states that Section 7002(a)(1)(B) "confers on citizens a limited right * * * to sue to abate an imminent and substantial endangerment" pursuant to liability standards under Section 7003, which "will complement, rather than conflict with, the Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources." H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1, at 53 (1983); see also S. Rep. No. 284, 98th Cong., 1st Sess. 55 (1983).

polluter will continue to pollute in the future." 484 U.S. at 57.[9]

Gwaltney does not provide an exact analogy to this case, because it did not deal with the same type of citizen remedy that is at issue here. *Gwaltney* addressed a statutory provision allowing citizens to enforce regulatory requirements; it did not involve RCRA's unique statutory grant of citizen authority to address "imminent and substantial endangerment."[10] The different remedies respond to quite different problems. For example, the citizen groups in *Gwaltney* brought suit to compel a meat processing plant to comply with its water pollution discharge permit. The groups could not abate the plant's violations through self-help interference in the plant's operations. By contrast, a citizen who seeks to enjoin an imminent hazard, such as a tank or pipeline leak, may have both the ability and an incentive to respond to the hazard. If the spill has invaded the citizen's own property, he may have a compelling need to abate or contain that threat himself without waiting for a court to act.

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[9] Among other factors, the Court found persuasive the "pervasive use of the present tense throughout § 505." 484 U.S. at 59. The Court also observed that "[p]ermitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id.* at 60.

[10] The statutory provision at issue in *Gwaltney* represents the most common formulation of a citizen suit remedy. RCRA includes a similar provision authorizing suits against any person "alleged to be in violation of" any permit, standard, regulation, condition, requirement, prohibition, or order effective under RCRA. See § 7002(a)(1)(A), 42 U.S.C. 6972(a)(1)(A). See also n.3, *supra* (citing other citizen suit provisions).

Although *Gwaltney* addresses a different type of citizen remedy, the Court's decision remains relevant. Perhaps most important, it indicates that the citizen remedy must be construed with careful attention to the statutory text. Section 7002(a)(1)(B) specifically addresses potentially imminent hazards. It expressly extends a citizen remedy only to those situations in which there is a current threat of substantial endangerment. Under the "most natural reading" of the statutory language, Section 7002(a)(1)(B) does not provide a remedy in a situation in which the danger has been wholly abated. In that circumstance, the citizen plaintiff needs to look elsewhere for any available legal remedies, including remedies under state law.[11]

3. We submit that Section 7002(a)(1)(B) does not provide respondent with a remedy in this case. Respondent has alleged that an imminent and substantial endangerment was present at the property that it had purchased from petitioners and that the danger existed until respondent cleaned up the site. But respondent has not alleged that there was any threat of substantial endangerment at the site when it filed its citizen suit some three years later. See Pet. App. A3. The district court correctly concluded that respondent's claim for relief did not satisfy

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[11] Section 7002(f) of RCRA expressly preserves state law remedies. See 42 U.S.C. 6972(f) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).").

the requirements for a citizen suit under Section 7002(a)(1)(B).[12]

Although Section 7002(a)(1)(B) does not provide a remedy in this case, it does provide an important remedy in many other situations. Section 7002(a)(1)(B) authorizes a citizen suit whenever hazardous waste activities "may present an imminent and substantial endangerment." 42 U.S.C. 6972(a)(1)(B). The lower courts have recognized that this language, by its terms, provides relief in a broad variety of circumstances.[13] In doing so, the courts have developed a cohesive body of law construing the relevant statutory terms. For example, they have held that the phrase "may present an imminent and substantial endangerment" indicates that a citizen may bring suit if there is a reasonable possibility of imminent danger.[14] They have also ruled that the

[12] The district court also indicated that respondent failed to provide 90 days' notice of suit, see Pet. App. A25, which is a mandatory condition precedent to commencing suit, under Section 7002(b)(2)(A). See *Hallstrom*, 493 U.S. at 31.

[13] See, *e.g.*, *Dague* v. *City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (city landfill), rev'd in part on other grounds, 505 U.S. 557 (1992); *Comite Pro Rescate de La Salud* v. *Puerto Rico Aqueduct & Sewer Authority*, 888 F.2d 180 (1st Cir. 1989) (factory wastes), cert. denied, 494 U.S. 1029 (1990); *Petropoulos* v. *Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511 (S.D. Ohio 1993) (wastes in underground storage tank); *City of Toledo* v. *Beazer Materials & Services, Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993) (wastes from coke plant).

[14] As the Second Circuit has explained, that language "does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present." *Dague*, 935 F.2d at 1355-1356. An imminent hazard "may be declared at any point in a chain of events which may ultimately result in harm to the public." *Id.* at 1356, quoting *Environmental Defense Fund* v. *EPA*, 465 F.2d 528, 535 (D.C. Cir. 1972);

specific term "imminent" refers to "the nature of the threat" regardless of when that threat initially arose and therefore allows a citizen to bring suit in response to current threats originating from past conduct that may produce future harm.[15] And they have indicated that while the threat of danger must be "substantial," that requirement will be satisfied if "there exists reasonable cause for concern for the integrity of the public health or the environment."[16]

cf. *United States* v. *Price*, 688 F.2d 204, 213-214 (3d Cir. 1982) (Section 7003 "authorizes the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat").

[15] *Dague*, 935 F.2d at 1356. Cf. Staff of Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess., *Hazardous Waste Disposal* 32 (Comm. Print 96-IFC 31, 1979) ("Imminence in [Section 7003] applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment."). The term "imminent" endangerment denotes a current hazard, see *Webster's Third New International Dictionary* 1130 (1986) (defining "imminent" as "ready to take place; near at hand; impending" and "hanging threateningly over one's head; menacingly near"), but it does not require current harm. In the case of environmental hazards, where current exposure may produce delayed incidences of cancer, birth defects, or mutagenic disorders, a danger can be "imminent" even though the actual harm "may not be realized for years." *United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 193-194 (W.D. Mo. 1985).

[16] *United States* v. *Valentine*, 856 F. Supp. 621, 626 (D. Wyo. 1994). See also *Conservation Chem. Co.*, 619 F. Supp. at 194 ("the word 'substantial' does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that 'excess deaths' will occur, or that a water supply will be contaminated to a specific degree)";

Section 7002(a)(1)(B) does not provide a remedy in the situation presented here, where the plaintiff has taken self-help action that completely eliminates a threat of substantial danger. That situation is not the one that Congress envisioned in enacting the citizen suit provisions. In most cases of substantial endangerment warranting federal relief, the perils posed by hazardous waste contamination cannot be eliminated instantaneously. A plaintiff who diligently pursues his legal rights should be able to commence a citizen action before a long-term cleanup can be fully implemented.[17] A plaintiff who undertakes some abatement efforts while pursuing his legal remedies does not forfeit the right to seek judicial relief under Section 7002(a)(1)(B) as long as a threat of substantial endangerment exists when the suit is filed.[18]

There may be situations in which a plaintiff must take immediate action to protect his own property from contamination and in doing so completely abates a threat of substantial endangerment that would otherwise be actionable. Those situations, however, are likely to involve hazards of limited scope and entail expenses that are recoverable under traditional

rather, "an endangerment is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken").

[17] In this case, KFC learned of the hazardous situation (which had existed since 1975) in October 1988. It did not complete its cleanup (which cost in excess of $200,000) until some time in 1989. See Pet. App. A2.

[18] As we explain below, a plaintiff that has been forced to take emergency action but has not completed cleanup of the longer term danger may be entitled, in appropriate circumstances, to reimbursement of its expenses in a RCRA citizen suit. See pp. 22-28, *infra*.

state law principles. For example, state law commonly provides a plaintiff with a remedy for "reasonable measures to remedy a nuisance."[19] A landowner may also have rights to cost recovery as a successor owner of property based on theories such as breach of warranty or fraudulent concealment.[20]

[19] *Stratford Theater, Inc.* v. *Town of Stratford*, 101 A.2d 279, 281 (Conn. 1953) (flooding from sewer pipe) ("Where * * * the owner takes reasonable measures to remedy the nuisance and prevent further injury, he is entitled to recover, as an element of damages, the reasonable cost of the measures he takes."). See also, *e.g.*, *Drouin* v. *Ridge Lumber, Inc.*, 619 N.Y.S.2d 433, 434-435 (N.Y. App. Div. 1994) (discharge of fuel) ("Plaintiffs were properly granted summary judgment declaring and holding defendant liable * * * for all cleanup and removal costs [incurred by plaintiffs] * * * resulting from defendant's discharge of gasoline."); *Amax, Inc.* v. *Sohio Indus. Prods. Co.*, 469 N.Y.S.2d 282, 284 (N.Y. Sup. Ct. 1983) (radioactive contamination) ("The abatement of the nuisance does not affect the right to recover damages for its past existence."); *Pollard* v. *Land West, Inc.*, 526 P.2d 1110, 1114 (Idaho 1974) (sewage contamination) (recovery of costs of drilling well to abate sewage nuisance); *Earl* v. *Clark*, 219 N.W.2d 487, 490 (Iowa 1974) (cattle manure) ("It is also understood the special damages which may be allowed include reasonable costs attendant upon removal of offensive nuisance deposits."); *Burk* v. *High Point Homes, Inc.*, 197 N.Y.S.2d 969, 972 (Sup. Ct.) (tons of highly piled loose dirt and sand) ("[D]efendant is * * * liable for damages to the plaintiffs' properties," including "the cost of removal of the defendant's dirt, sand and mud."), appeal dismissed, 205 N.Y.S.2d 862 (N.Y. App. Div. 1960); *Sheridan Oil Co.* v. *Wall*, 103 P.2d 507, 510 (Okla. 1940) (crude oil leakage) ("The rule as to recovery of 'temporary' damages assumes either that the defendant by reason of successive suits against him will be compelled to remove or abate the [nuisance] * * * and where plaintiff abates the nuisance, he is entitled to recover his reasonable expenses thereby incurred.").

[20] See *Roadmaster Indus., Inc.* v. *Columbia Mfg. Co.*, 893 F. Supp. 1162 (D. Mass. 1995) (allowing suit for contract

As the court of appeals noted (Pet. App. A11 n.6), respondent currently has an action pending in state court. See *KFC Western, Inc.* v. *Meghrig*, 28 Cal. Rptr. 2d 676 (Cal. Ct. App. 1994).

The text of RCRA indicates that Congress recognized the availability of state law remedies and supported their use in response to dangers posed by hazardous wastes. See RCRA § 7002(f), 42 U.S.C. 6972(f) (preserving state law remedies). Congress's explicit preservation of those remedies manifests its belief that state law adequately addresses situations that fall outside of Section 7002's scope. Furthermore, there is no reason to expect that duties imposed by federal law will be ignored in the application of state remedies. To the contrary, state courts are under an obligation to take into account RCRA's environmental standards and requirements when applying their state remedies. See, *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 393 (1947) ("the policy of the federal Act is the prevailing policy in every state").[21]

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rescission and tort damages for sale of contaminated property); *Mailman's Steam Carpet Cleaning Corp.* v. *Lizotte*, 616 N.E.2d 85 (Mass. 1993) (costs to clean up underground oil tanks awarded under breach of warranty claim). A nuisance action may be available in actions between a purchaser and former lessee. See *Wilshire Westwood Assocs.* v. *Atlantic Richfield Co.*, 24 Cal. Rptr. 2d 562, 569-570 (Cal. Ct. App. 1993) (holding plaintiffs entitled to seek recovery for damages in nuisance against former lessees who contaminated the property).

[21] The court of appeals' suggestion that state law remedies will be inadequate in light of "difficulties of proof and attendant court delays" (Pet. App. A11 n.6) is open to question. In any event, those concerns do not provide an adequate basis for creating a federal cause of action that Congress did not provide. Cf. *Thompson* v. *Thompson*, 484 U.S. 174, 187 (1988).

More generally, the result that we urge is consistent with the statutory objectives that Congress sought to achieve through the citizen suit mechanism. Congress created a citizen remedy to supplement federal enforcement efforts in order to bring about compliance to protect public health and safety, not to provide a private cause of action that merely duplicates state law remedies in disputes between individuals.[22] Just as a citizen suit cannot go forward if the government is appropriately responding to the hazard, RCRA § 7002(b)(1)(B), 42 U.S.C. 6972(b)(1)(B), the suit should not proceed if the alleged hazard has been completely abated prior to suit. See *Price* v. *United States Navy*, 39 F.3d 1011, 1019-1021 (9th Cir. 1994). Section 7002(a)(1)(B) provides no basis for reaching a different result simply because the citizen plaintiff, rather than someone else, has eliminated the potential endangerment.[23]

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[22] See H.R. Rep. No. 198, *supra*, at 53; S. Rep. No. 284, *supra*, at 55, 57. Section 7002(b)'s statutory notice requirement and other limitations on citizen suits reflect Congress's overarching concern that the citizen suit complement federal enforcement efforts. See RCRA § 7002(b), 42 U.S.C. 6972(b). See also *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 328-329 (9th Cir. 1995) (explaining that if the government initiates a CERCLA cleanup, CERCLA itself precludes a citizen plaintiff from seeking RCRA relief at the site), cert. denied, No. 94-1807 (Oct. 2, 1995).

[23] As the court of appeals recognized, the citizen's remedy under Section 7002 and the government's remedy under Section 7003 are similar in many respects. See Pet. App. A7; see also H.R. Rep. No. 198, *supra*, at 53 (stating that Section 7002 confers a limited right to sue to abate an endangerment "pursuant to the standards of liability established under Section 7003"); S. Rep. No. 284, *supra*, at 55-57 (accord). The Court should be aware, however, that the federal government's remedy is broader than the citizen's remedy. Section

B. A Citizen Plaintiff That Properly States A Cause Of Action Under Section 7002(a)(1)(B) May Invoke The Court's Traditional Equitable Powers To Obtain Appropriate Relief

1. This Court has stated on numerous occasions that if Congress grants a district court authority to provide equitable relief, the court may exercise "all the inherent equitable powers" of traditional equity jurisdiction, including the power to order restitution. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982); *United States* v. *Moore*, 340 U.S. 616, 618-620 (1951); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). See also *Mertens* v. *Hewitt Assocs.*, 113 S. Ct. 2063, 2069 (1993) (" 'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages")).

7003(a) grants the EPA authority to take "other action * * * including, but not limited to, issuing such orders as may be necessary to protect public health and the environment." 42 U.S.C. 6973(a). Thus, the EPA may act to protect the public welfare without invoking the jurisdiction of the courts. Furthermore, the government may be entitled to restitution for the costs of such action. See *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 204-205 (1967) (recognizing the government's right to restitution for abatement actions under the Rivers and Harbors Appropriation Act of 1899). The federal rule in *Wyandotte* reflects the familiar principle that public agencies and municipalities may recover the costs of abating public nuisances. *City of Paterson* v. *Fargo Realty Inc.*, 415 A.2d 1210, 1216-1217 (N.J. Dist. Ct. 1980) (recovery of costs through imposition of lien or a personal judgment against property owner); *Brandon Township* v. *Jerome Builders, Inc.*, 263 N.W.2d 326, 327 (Mich. Ct. App. 1977) (recovery of costs through assessment against property); *Oberst* v. *Mays*, 365 P.2d 902, 904 (Colo. 1961) (recovery of costs through assessment against property). Issues respecting the reach of Section 7003 are not before the Court in this case.

The Court's decision in *Porter* addressed Section 205(a) of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 33; 50 U.S.C. App. 925(a) (1946). That Act provided that if the Administrator of the Office of Price Administration made a showing of a price control violation to the appropriate district court, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 328 U.S. at 397. The Court concluded that the phrase "other order" included an order for the restitution of illegal rents. *Id.* at 399. The Court reasoned that unless the underlying statute provided otherwise, the district court was entitled to exercise "all the inherent equitable powers" in providing an appropriate remedy. *Id.* at 398.

The Court explained that "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." 328 U.S. at 398. It laid down the following principle:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503.

Ibid. The Court held that restitution may be granted either as "an equitable adjunct to an injunction decree" or as "an order appropriate and necessary to enforce compliance with the Act." *Id.* at 399-400. As to the latter, "inherent equitable jurisdiction * * * clearly authorizes a court, in its discretion, to decree

restitution of excessive charges in order to give effect to the policy of Congress." *Id.* at 400.

The Court reached a similar result in *Moore*, which held that a court could order restitution of rent overcharges under Section 206(b) of the Housing and Rent Act of 1947, ch. 163, 61 Stat. 199-200; 50 U.S.C. App. 1986(b) (1958). That Act authorized courts to grant a permanent or temporary injunction, restraining order, "or other order" in response to a showing of an actual or threatened rent control violation. 340 U.S. at 618-619. The Court concluded that restitution "clearly enforces compliance with the Act" and that Section 206(b) is not confined to securing prospective adherence to the law. *Id.* at 620.

The principles that this Court articulated in *Porter* and *Moore* are well established, and they have been applied as a matter of course in cases involving the exercise of equitable powers. See, *e.g.*, *Romero-Barcelo*, 456 U.S. at 313. The Court's decision in *School Committee of Town of Burlington* v. *Department of Education*, 471 U.S. 359 (1985), reflects a similar conception of a federal court's equitable powers. The Court there concluded that the Education of the Handicapped Act, 20 U.S.C. 1415(e)(2), which authorizes courts to "grant such relief as the court determines is appropriate," confers power to order school authorities to reimburse parents for private school expenses. 471 U.S. at 369. The Court reasoned that the statutory provisions confer "broad discretion on the court" and require only that "the relief is to be 'appropriate' in light of the purpose of the Act." *Ibid.*

2. Section 7002(a) of RCRA grants the district courts the power

> to restrain any person who has contributed or who is contributing to [the solid or hazardous waste activities] referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both.

42 U.S.C. 6972(a). That Section clearly confers equitable power, and neither Section 7002(a) nor any other provision of RCRA contains any "clear and valid legislative command" restricting the district courts' exercise of traditional equitable authority. See *Romero-Barcelo*, 456 U.S. at 313; *Porter*, 328 U.S. at 398. To the contrary, by authorizing district courts to order responsible persons "to take such other action as may be necessary," Congress evinced an intent to confer the full scope of equitable jurisdiction.

Under this Court's decisions in *Porter* and *Moore*, Section 7002(a)'s authorization to "restrain" and "order * * * such other action as may be necessary" draws on "all the inherent equitable powers," including the power to order restitution. *Porter*, 328 U.S. at 398-399. Restitution, which provides a remedy for "unjust enrichment," is a familiar form of equitable relief. See 1 D. Dobbs, *Law of Remedies* § 4.1(1) at 551-552, 556-557 (2d ed. 1993); *Restatement of Restitution* § 1 (1937). That remedy may be "appropriate and necessary" in some circumstances to ensure the effectiveness of a citizen suit. See *Porter*, 328 U.S. at 400.

Of particular relevance here, a court may award restitution to provide reimbursement for "performance of another's duty to the public." *Restatement of Restitution* § 115 (1937). Section 115 specifically states:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if

(a) he acted unofficiously and with intent to charge therefor, and

(b) the things or services supplied were immediately necesary to satisfy the requirements of public decency, health, or safety.

Federal and state courts have awarded a restitutionary remedy in a variety of such circumstances.[24]

A court must, of course, examine the specific facts to determine whether restitution is warranted and in what amount. Restitution is not the equivalent of a damages remedy.[25] It generally is not available to a party who, "incidentally to the performance of his own duty or to the protection or the improvement of his own things," confers a benefit on another. *Restatement of Restitution* § 106 (1937).[26] Furthermore, restitution generally will not be awarded "unless the person having the duty has been first requested to perform it, except where such request would be useless because the one having the duty has indicated an intent not to perform or where time limitations prevent the making of such a request." *Restatement of Restitution* § 115 cmt. a (1937).[27]

Indeed, RCRA's citizen suit provisions impose a 90-day notice requirement that is consistent with that principle of restitution. Section 7002(b)(2)(A)(iii) provides that, as a precondition to suit, a citizen plaintiff must give notice of its intent to sue to any person "alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste." 42 U.S.C. 6972(b)(2)(A)(iii). A primary purpose of providing notice is to give the recipient an opportunity to take action on its own and thereby "render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 60; *Hallstrom*, 493 U.S. at 29. Hence, a person who receives notice but thereafter fails or declines to abate the endangerment may be liable in restitution under traditional equitable principles.

Thus, in appropriate circumstances, an award of restitution would be proper in the citizen suit context. As we have explained, Congress authorized citizen actions "to abate imminent and substantial endangerments" as a complement to the EPA's authority to address imminent hazards under Section 7003. If persons responsible for creating public health hazards could ignore a duty to abate those hazards, free from any obligation of recompense to those who take necessary response actions on their

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[24] See, *e.g.*, *Wyandotte Transp. Co.*, 389 U.S. at 204, citing *Restatement of Restitution* § 115; *State* v. *Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010, 1014 (N.Y. App. Div. 1984) (recognizing the State's cause of action for restitution for cleaning up waste contamination, notwithstanding the State's statutory enforcement duties); *Brandon Township*, 263 N.W.2d at 328 (cause of action for restitution, under *Restatement of Restitution* § 115, where Township repaired privately owned dam to address "imminent threat" of rupture and flooding).

[25] In cases where the recipient has abated a hazard, restitution is generally "limited to the reasonable costs for abatement, not necessarily the amount expended, and does not extend to future costs." *Schenectady Chems., Inc.*, 479 N.Y.S.2d at 1014.

[26] For example, under that Section of the Restatement, a private plaintiff that is itself responsible under RCRA Section 7002(a)(1)(B) to clean up an imminent and substantial endangerment or is under some other legal duty to perform the cleanup may not be entitled to restitution.

[27] See *Town of Hooksett School Dist.* v. *W.R. Grace & Co.*, 617 F. Supp. 126, 134 (D.N.H. 1984); *Hebron Public School Dist. No. 13* v. *U.S. Gypsum*, 690 F. Supp. 866, 869 (D.N.D. 1988).

behalf, the responsible parties would evade their legal obligations and innocent citizens would be unfairly penalized for assisting the government's abatement efforts. See *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 204 (1967) (concluding that restitution was necessary to avoid "the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim").[28]

3. In light of the foregoing principles, there should be little doubt that a federal court is empowered to award restitution under Section 7002(a)(1)(B) in appropriate circumstances. The question whether to provide that remedy in any particular case requires a careful examination of the facts and a principled exercise of remedial discretion. See generally *Restatement of Restitution* Ch. 1, introductory note at 11 (1937). This Court, however, need not address any of those issues in this case. The court of appeals erred in concluding that respondent qualified to seek relief in a citizen suit under Section 7002(a)(1)(B). That error requires reversal of the court of appeals' decision and renders hypothetical the question of what remedies would be available if respondent had stated a valid claim for relief.

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[28] As we have explained, a person who abates a nuisance, but does not satisfy the preconditions for Section 7002(a) relief, would normally be entitled to pursue traditional remedies, including restitution, under state law. See pp. 18-20 & nn.19-20, *supra*. There is no reason why a person who *does* satisfy those preconditions should—by contrast—be denied a restitutionary remedy, which is a familiar form of equitable relief under both federal and state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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